No. 11982.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. F. SMITH,

Appellant,

vs.

JIM DANDY MARKETS, INC., FIREMAN'S FUND INSURANCE COMPANY, CENTRAL MANUFACTURER'S MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellees,

and

CENTRAL MANUFACTURER'S MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC.,

Appellee.

Reply Brief of Appellant Smith to Brief of Appellee Jim Dandy Markets, and to Brief of Appellee Fireman's Fund Insurance Company.

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REPLY BRIEF OF APPELLANT SMITH TO BRIEF OF JIM DANDY MARKETS, INC.

Appellant Smith wishes to point out that the conclusions in Point I and Point II made by appellee Jim Dandy Markets are not justified by the facts in the case now before the Court, and, as applied to such facts, the cases cited do not support such conclusions.

POINT I.

As treated by Jim Dandy Markets, an assignment of a lease in "the usual form used by lawyers" always and without any exception carries with it any and all rights the lessee might have in a building situated on the land covered by the lease, and this without regard to the intention of the parties as ascertained from the entire transaction. This result is reached on the erroneous premise that the assignment made by appellant Smith to Jim Dandy Markets can be separated from the agreements, subleases, other documents, and other evidence that the building was not a part of the subject matter of the sale to Jim Dandy Markets. The true rule is that the entire transaction must be considered in determining the intention of the parties, as fully discussed in appellant Smith's Opening Brief beginning on page 14.

The case of *Methodist Episcopal Church v. Seitz,* 74 Cal. 287, 15 Pac. 839, relied on by appellee Jim Dandy Markets, supports the true rule and the Court's decision is based on a determination of what the parties intended, arrived at after full consideration of all elements pertinent to a determination of the intention. Immediately following the quotation printed in Jim Dandy's Markets' Brief, the Court says:

> "We do not think this was the intention of the parties. It seems to us that they intended to transfer the ownership of the building, and that the assignment does not defeat this intention."

and again,

> "This was the practical construction of the parties, including the defendant; for he joined with plaintiff

in appointing appraisers preparatory to purchasing from plaintiff the ownership which he now says plaintiff never had."

By posing questions of why Smith did not demand rent and whether any reasonable man would accept bare land without a building, Jim Dandy Markets admits the pertinence of the intention of the parties—it seeks to find the intention from the answers which such questions suggest, instead of an examination of the entire transaction as is done in Smith's Opening Brief.

The questions might be answered by a question—would any reasonable man convey title to two buildings, one worth $32,000.00 and the other of comparable value, for no compensation whatever? This question is predicated on the fact that the value of the buildings never entered into the price negotiations and other facts pointed out in appellant Smith's Opening Brief.

There are some additional facts showing that no compensation was paid for the building. The Supplementary and Modified Agreement provided for the consummation of the contract as to the Atlantic Market on the payment of $27,300.00 [R. 70]. At the time of the fire there remained unpaid the sum of $21,700.00 which was paid by the proceeds of the fire insurance on the fixtures, $20,000.00, and a check of Jim Dandy Markets for $1,700.00 [R. 205]. Since fixtures and equipment are not insured at their face value and a fire policy does not cover good will or other values of a going business, the deduction is inescapable that the $27,300.00 was the agreed value of the Atlantic Market not including the building worth in excess of $32,000.00.

The intention is clearly to assign only the ground lease and not to transfer a building which because of the agreement is personal property and which building was not listed in the inventory [R. 207] of personal property transferred under the contract. By analyzing the transaction and determining the intention of the parties as was done by the Supreme Court of California is the case of *Methodist Episcopal Church v. Seitz,* cited above, the assignment of the ground lease by Smith to Jim Dandy Markets did not convey the title to the building belonging to Smith.

POINT II.

Under this Point Jim Dandy Markets relies on the general principle that a mistake must be mutual and cites authorities to establish that general principle, but to no other effect. They are no help in determining the mutuality of the mistake in the present case.

In the case of *Meyerstein v. Burke,* 193 Cal. 105, 222 Pac. 810, the Court points out that the record discloses a "hopeless conflict in the testimony" and that under such conditions the reviewing Court will not re-examine the evidence but will accept the findings made by the Trial Court. The Trial Court found no mutual mistake was made and that any mistake made by the plaintiff was neither known to nor suspected by the defendants. A conclusion of law from such specific findings is of no help in determining the mutuality of the mistake from the evi-

dence in the case now before the Court, which evidence is undisputed and without contradiction.

Likewise in the case of *Harding v. Robinson,* 175 Cal. 534, 541, 166 Pac. 808, the Court points out that not only the findings but the complaint is "inefficient and inefficacious" to support a judgment on the ground of mistake. The Court then enumerates the various types of mistake, including that defined in Section 1640 of the Civil Code that "when, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous part of the writing disregarded." This is the exact position taken by appellant Smith. The transaction from the beginning established the subject matter as the fixtures and equipment which were to be transferred from Smith to Jim Dandy Markets. In no instance was any building mentioned as being sold or the title transferred to Jim Dandy Markets. The leases and subleases specifically and by their nature recognized the title in Smith. If title of the Atlantic Market building is transferred to Jim Dandy Markets, it is only so on the theory that an assignment in "the usual form used by lawyers" transferred the building by operation of law and not because the assignment said that the building was transferred.

Since the building was never mentioned in any of the negotiations or documents as a part of the subject matter being transferred and since its value was not an element in fixing the sale price, one of two deductions must of

necessity follow; either the mistake was mutual and neither Smith nor Jim Dandy Markets intended to convey the building; or Jim Dandy Markets knew or suspected that Smith was mistaken when he signed the documents which would have the legal effect of transferring the building.

The evidence of mistake on the part of Smith is direct from himself and his agents and is overwhelmingly supported by all documents and the related facts. It is inconceivable that any of the Jim Dandy partners or agents could have participated as they did in the transaction without being under the same mistake. If they were not mistaken—they were negotiating to buy the building, but kept it a secret from Smith. By keeping it secret they disclosed not only that they "suspected" Smith's mistake but that they knew it and were deliberately withholding the information from him so that he would sign the document including the assignment without realizing that the building was to be considered as one of the items transferred to Jim Dandy Markets. This is certainly within the perview of the California law of what constitutes a mutual mistake.

Logically the mistake was mutual or known or suspected by Jim Dandy Markets. However, Jim Dandy Markets offered the Court not one word of testimony or evidence to sustain its position or to overcome the obvious and logical deductions.

REPLY BRIEF OF APPELLANT SMITH TO BRIEF OF FIREMAN'S FUND INSURANCE COMPANY.

Appellee Fireman's Fund Insurance Company accepts the findings and judgment of the Trial Court that the building was transferred to Jim Dandy Markets, and, on that premise argues that, because of the change in interest, its policy was suspended and there was no liability to Smith. This requires no answer as it completely ignores the questions before this Court.

If this Court determines that Smith did not transfer the building, and the Fireman's Fund Insurance Company then refuses to recognize its liability, Smith will have to take such action as the conditions warrant.

In the meanwhile the Fireman's Fund Insurance Company is a party to this action and will be bound as to any facts adjudicated.

Conclusion.

The judgment should be reversed and judgment entered by this Court that the building in question belonged to appellant Smith at the time of the fire.

Respectfully submitted,

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